No. 91-1292

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAITIAN REFUGEE CENTER, ET AL., PETITIONERS

v.

JAMES BAKER, III, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MICHAEL JAY SINGER
JOHN F. DALY
EDWARD T. SWAINE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

This case involves a challenge to an interdiction program established by the President. Under that program, Haitian aliens seeking illegal entry into the United States are interdicted on the high seas and repatriated to Haiti, unless they establish a credible claim to refugee status. The questions presented are:

1. Whether Article 33.1 of the United Nations Convention on the Status of Refugees affords the petitioner Haitian migrants any enforceable rights in United States courts with respect to the operation of the interdiction program outside the territory of the United States.

2. Whether any judicially enforceable rights are conferred on the Haitian migrants by the Executive Order establishing the interdiction program, internal operating guidelines issued by the Immigration and Naturalization Serevice, or Sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1158(a) and 1253(h).

3. Whether the petitioner Haitian migrants have a cause of action to challenge the interdiction program under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

4. Whether injunctive relief barring repatriation of Haitian migrants is in any event barred by equitable principles.

5. Whether petitioner Haitian Refugee Center has a right under the First Amendment to have its representatives board Coast Guard cutters on the high seas and enter the United States Naval Base at Guantanamo Bay, Cuba, to speak with and advise interdictees who are held in custody.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

U.S. Constitution, treaties, statutes and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1292

HAITIAN REFUGEE CENTER, ET AL., PETITIONERS

v.

JAMES BAKER, III, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. This case arises out of the President's exercise of his constitutional and statutory authority to establish a program for interdicting aliens on the high seas. See 8 U.S.C. 1182(f), 1185(a). That program, begun in 1981, stems from a Presidential determination that uncontrolled illegal immigration by sea is a "serious national problem." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). Accordingly, the President, by Executive Order, directed the Coast Guard to intercept vessels suspected of transporting illegal immigrants and to return all of the passengers to their country of origin, subject to the proviso that any "person who is a refugee" is not to be repatriated without his consent. Exec. Order No. 12,324, § 2(c)(3) (Pet. Exh. 1-2).[1] Contemporaneously, the United

[1] As used herein, "Pet. Exh." refers to the exhibits included in the bound certiorari petition; "Pet. App." refers to the six volumes

States entered into a bilateral agreement with Haiti, under which U.S. officials are permitted to interdict and board Haitian flag vessels suspected of carrying illegal immigrants. Agreement Effected by Exchange of Notes, Sept. 23, 1981, United States-Republic of Haiti, 19 U.S.T. 8223, T.I.A.S. No. 10,241 (Pet. Exh. 4-6).

The interdiction program has been a very effective tool in the enforcement of our immigration laws. It has also saved countless lives. Most vessels interdicted have been "grossly overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced sailors." 11/20/91 Decl. of Rear Admiral Leahy ¶ 4 (Gov't Stay App. B, Exh. 3). Many of these vessels could not have completed the 500-mile voyage to the United States. Between 1981 and 1991, more than 25,000 would-be migrants were interdicted. *Ibid.* A State Department study of migration patterns from Haiti over that period "indicates that increased outflows tend to coincide with periods of economic difficulty rather than any particular political factor." 12/1/91 Decl. of Robert S. Gelbard ¶ 3 (Gov't Stay App. C, Exh. 10). Thus, although the present crisis began with a military coup in Haiti on September 30, 1991, the virtual exodus of illegal immigrants from Haiti began approximately one month later, when economic sanctions were imposed. 11/20/91 Leahy Decl. ¶ 5; Gelbard Decl. ¶ 3. More than 15,000 Haitian migrants have been interdicted by the Coast Guard since October 28, 1991.

Under Section 3 of the Executive Order, the Attorney General is responsible for determining whether any of the aliens taken into Coast Guard custody are "refugees" —persons who have a well-founded fear of persecution on account of their political opinion (see 8 U.S.C. 1101 (a)(42)(A); *INS v. Elias-Zacarias*, No. 90-1342 (Jan. 22, 1992), slip op. 4)—who should not be repatriated. To implement this directive, the Immigration and Naturali-

---

of appendices filed by petitioners; and "Gov't Stay App." refers to the appendices to the Application for a Stay Pending Appeal we filed in this Court on January 30, 1992.

zation Service (INS) developed screening procedures, which are set forth in internal "guidelines" (Pet. Exh. 7-9) and further described in declarations filed below. 11/20/91 Decl. of Leon Jennings (Gov't Stay App. B, Exh. 5); 12/10/91 Decl. of Gregg A. Beyer ¶¶ 3-4, 8-15 (Gov't Stay App. G).

Under the procedures, an INS official first interviews the interdicted aliens on board the Coast Guard cutter to identify any aliens who make a credible showing of refugee status. The INS guidelines create an informal, non-adversarial process to permit expeditious identification of potential refugees so that the Coast Guard can immediately return other interdicted aliens to their country of origin. Under current practice, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under Section 208(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1158(a). These "screened in" individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a "refugee" and otherwise qualify for the discretionary relief of asylum. Any aliens who are initially "screened in" but ultimately not granted asylum are then to be returned to their country of origin, consistent with procedures afforded under the INA.

2. On November 19, 1991, immediately following the resumption of repatriations (which the Executive Branch had temporarily suspended in the wake of the coup in Haiti), petitioner Haitian Refugee Center (HRC) filed this action for injunctive relief against officials of the Department of State, the Coast Guard, and INS. Although the D.C. Circuit had previously held that HRC (a private, non-profit corporation in the United States) did not have standing to bring many of the same claims affecting Haitians interdicted on the high seas,[2] the dis-

---

[2] *HRC* v. *Gracey*, 809 F.2d 794 (D.C. Cir. 1987). In a separate opinion, Judge Edwards rejected HRC's claims on the merits, con-

trict court, within a few hours, granted HRC's application for a temporary restraining order (TRO) barring repatriations. Because the United States was unable to appeal the TRO, it was compelled fundamentally to alter the interdiction program. Although the Coast Guard continued to interdict the Haitian migrants, they could not be returned to Haiti or kept indefinitely on the decks of Coast Guard cutters; the interdictees therefore were transported to the U.S. Naval Base at Guantanamo Bay, Cuba, where they could be temporarily housed in shelters under the custody of the Department of Defense and INS. In the interests of continuity and uniformity, however, INS continued to conduct the initial screening interviews at Guantanamo pursuant to the informal, nonadversarial procedures utilized aboard Coast Guard cutters. While the TRO was in effect, the district court also ordered discovery that permitted representatives of HRC to have access to individual Haitians at Guantanamo. Pet. App. 41, 63. HRC then filed an amended complaint, in which it named some individual Haitians, to whom it obtained access only through discovery as plaintiffs and as representatives of a class. Pet. App. 62; Gov't Stay App. F.

3. On December 3, 1991, the district court entered a preliminary injunction against repatriation based on two of petitioners' numerous claims—those arising under Article 33 of the U.N. Convention and the First Amendment. Pet. App. 42.[3] The government took an immediate appeal,

---

cluding that the interdiction program violated no rights of the Haitians under the INA, the Constitution, or Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. 809 F.2d at 837-841. The United States acceded in 1968 to the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, which bound parties to adhere to Articles 2-34 of the Convention.

[3] The district court found, however, that petitioners had not shown a probability of success on their remaining claims under the Fifth Amendment, INA, Executive Order, INS guidelines, and Administrative Procedure Act (APA). Pet. App. 42, at 52-55.

and on December 17, 1991, the court of appeals dissolved the preliminary injunction. Pet. App. 43. The court instructed the district court to dismiss the claims under Article 33, holding that it is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs. *Id.* at 3. It also held that HRC's claim of a First Amendment right of access to the interdictees could not support the district court's order barring repatriation of the interdictees, since that relief did not redress any right asserted by HRC. *Id.* at 3-4.[4] Judge Hatchett dissented.

4. On the evening of the day the court of appeals ruled, the district court granted another "temporary" order against repatriation of the Haitian interdictees, this time based on the same APA claims that it had rejected just fifteen days earlier. Pet. App. 44. On December 19, 1991, the court of appeals, again over Judge Hatchett's dissent, granted the government's motion for an emergency stay of that order. Pet. App. 45. On the following day, however, the district court entered yet another injunction against repatriation, this time based on HRC's asserted constitutional right of "access" to Guantanamo to confer with interdictees. Pet. App. 46. Despite the government's immediate appeal of that order and request for an immediate stay, the court of appeals allowed the injunction to stand pending expedited briefing and argument. In late January, when the tide of Haitian emigration increased significantly and threatened disruption of the Nation's foreign policy interests and military operations on the high seas and at Guantanamo, the government renewed its motion for a stay. After the court of appeals failed to respond, the government sought a stay of the injunction from this Court. The Court granted a stay on January 31, 1992, and the court of appeals granted a stay as well. Pet. Stay Applic. 19-21.

---

[4] Petitioners' suggestion of rehearing *en banc* with respect to the Article 33 ruling was rejected on January 28, 1992, with no judge having requested a formal poll of the court. Pet. App. 51.

5. On February 4, 1992, the court of appeals rendered a thorough decision rejecting all of petitioners' remaining claims and ordering dismissal of the complaint for failure to state a claim on which relief can be granted. Pet. App. 56. The court first held that petitioners have no right to judicial review under the APA, relying on the exceptions where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." *Id.* at 14-24; see 5 U.S.C. 701(a)(1) and (2). With respect to the former, the court recognized that it must "look not only at the express language of the statute but the statutory scheme as a whole." Pet. App. 56, at 15 (citing *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). It noted that the relevant substantive and judicial review provisions of the INA apply only to aliens within the United States (8 U.S.C. 1105a, 1158, 1253), and that judicial review is unavailable for persons, such as the Haitian aliens here, who are outside the United States. On this basis, the court held that "review under the APA is foreclosed because the relevant provisions of the INA provide the sole and exclusive avenue for judicial review." Pet. App. 56, at 16. In its view, this conclusion was further supported by case law holding that aliens outside the United States have no right to review of immigration determinations. *Id.* at 16-19.

In finding that the actions petitioners challenge are also "committed to agency discretion by law," the court acknowledged the narrowness of that exception but noted the breadth of the discretion afforded the President by 18 U.S.C. 1182(f) and the absence of any statutory limits on interdiction and repatriation activities and procedures. Pet. App. 56, at 20-21. It further held that, even assuming that other possible sources of law (*e.g.*, the Executive Order, INS guidelines, or the Convention) could form the basis of an APA action, none provided meaningful standards for review of the issues in this case—*i.e.*, the manner in which INS is to conduct refugee

screening in the high seas interdiction program. *Id.* at 21-23.

The court of appeals next addressed various theories advanced by the Haitian petitioners that even the district court had rejected. Thus, it held that the INA, as amended by the Refugee Act of 1980, affords no independent basis for relief. Pet. App. 56, at 25-27. The court reasoned that 8 U.S.C. 1253(h), like the entirety of the Section in which it appears, applies only to aliens "in the United States." Pet. App. 56, at 26 (quoting 8 U.S.C. 1253(a)). The court also noted that the asylum provision, 8 U.S.C. 1158, applies only to aliens "physically present in the United States or at a land border or port of entry," and it rejected petitioners' argument that the high seas become the "functional equivalent" of a port of entry whenever the United States conducts interdiction operations. Pet. App. 56, at 26-27. The court of appeals likewise rejected petitioners' argument that either the Executive Order or the INS guidelines could themselves—independently of the APA—create a private cause of action. *Id.* at 28-30. In its view, the terms and purposes of the Executive Order—which specifically contemplates "a procedure taking place entirely on the high seas"—could not have been intended to confer a right of judicial review. *Id.* at 28. The court also ruled that the INS guidelines were intended simply to provide internal instructions to INS employees, and lack the "force and effect of law" necessary for judicially enforceable rights. *Id.* at 28-30.

Finally, the court rejected petitioner HRC's claim that it has a First Amendment "right of access" to Haitian interdictees on board Coast Guard cutters or at Guantanamo. Pet. App. 56, at 30-38. It first concluded that the precedents upon which HRC and the district court chiefly relied—*NAACP* v. *Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978)—do not support a broad right of access to persons in government custody, but rather "recognize a narrow First Amendment right to associate for the purpose of engaging in litiga-

tion as a form of political expression." Pet. App. 56, at 34. Because such a right of association is "predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant," the court believed it "nonsensical" to find such a right here, since the interdicted Haitians have no enforceable rights under the Constitution or laws of the United States. *Ibid.*

Finally, the court of appeals held that even if HRC had a right to associate with interdicted Haitians, the First Amendment does not impose upon the federal government an affirmative obligation to assist it in exercising that "right" by affording access to aliens in custody aboard Coast Guard ships on the high seas or at a military base in a foreign country. Pet. App. 56, at 34-37. The court recognized that affording such access to HRC would impose substantial burdens on the United States, *id.* at 36-37, and emphasized that the only other appellate decision directly on point had squarely rejected the notion that the government must assist citizens wishing to communicate with aliens who are in custody awaiting administrative proceedings. *Id.* at 37-38 (discussing *Ukrainian-American Bar Ass'n* v. *Baker*, 893 F.2d 1374 (D.C. Cir. 1990)).[5]

ARGUMENT

The court of appeals properly rejected petitioners' unprecedented assault upon the prerogatives and duties of the Executive Branch to carry out the Nation's foreign relations, direct military operations abroad, and control illegal immigration. For more than two months, a series of district court injunctions stymied the efforts of the Executive Branch to implement its longstanding policy

[5] Judge Hatchett dissented. He agreed with the majority that HRC has no constitutional right of access to Coast Guard ships on the high seas, but believed that HRC has a right of access to aliens in custody at Guantanamo. Pet. App. 56, at 4-9 (dissenting opinion). Judge Hatchett also disagreed with the majority's APA analysis. *Id.* at 10-25. He did not address petitioners' remaining claims. *Id.* at 1 n.1.

of interdicting and promptly repatriating Haitian migrants attempting to enter this country illegally. These judicial intrusions into matters committed to the Executive Branch were utterly without basis in the Constitution and laws of the United States, and the court of appeals' holding that petitioners' complaint must be dismissed for failure to state a claim is fully consistent with the decisions of this Court and other courts of appeals. Indeed, with respect to the central legal issues, three other courts of appeals—like the court below—have held that Article 33 of the Refugee Convention is not self-executing (see pages 13-14, *infra*), and the only other court of appeals to have considered the First Amendment claim HRC raises—the D.C. Circuit in *Ukranian-American*—has likewise rejected it. Accordingly, the legal issues petitioners raise plainly do not warrant review by this Court.

In addition, the district court's sweeping injunctions barring repatriations were wholly improper on equitable grounds. The injunctions fundamentally defeated the purposes of the interdiction program, required the United States to establish camps for Haitian migrants at Guantanamo Naval Base, necessitated the substantial diversion of resources from other military and law enforcement tasks, and interfered with the conduct of the Nation's foreign relations regarding Haiti and Cuba. Separation of powers principles commit such matters to the political Branches, and preclude the judiciary from granting the extraordinary equitable relief of an injunction having such adverse effects.

This Court's stay of January 31—and the court of appeals' own stays and rulings rejecting petitioners' claims on the merits—have now freed the responsible Executive Departments to carry out the interdiction program and conduct the Nation's foreign policy and military operations at Guantanamo and on the high seas without the direct judicial interference under which they labored for more than two months. But the United

States remains committed to restoring democratic rule in Haiti, ensuring that interdictees who truly are refugees under established legal standards are not returned to Haiti without their consent, holding the de facto authorities in Haiti to that country's commitment not to prosecute or persecute individuals because of their departure, and monitoring the repatriation process and related events in Haiti to guard against any persecution of the returnees and others. Since the stays were entered by this Court and the court of appeals on January 31, the repatriation of interdictees who were found not to have a colorable claim of refugee status has proceeded on a regular basis, without incident and without credible reports of retaliation against the returnees.

This case was launched by an ill-considered TRO barring repatriations that was issued at the behest of an organization (HRC) that had no standing to seek that relief; it has since taken on a life and regime of its own and has, regrettably, driven significant aspects of the Nation's immigration, military and foreign policy. We now respectfully request the Court to bring the litigation to a definitive close by an immediate denial of certiorari. That disposition would remove the shadow that the case continues to cast over the Nation's policies concerning Haiti and the Executive's conduct of its constitutionally assigned responsibilities.

A. 1. Petitioners first contend (Pet. 17, 25-26) that the repatriation of Haitian interdictees violates Article 33.1 of the U.N. Convention. That contention is without merit for a number of reasons.

a. In the first place, Article 33.1 is simply inapplicable in this case. The text of the Article, its negotiating history, and its implementation by the United States all support the official interpretation by the Department of State—which is entitled to great weight, *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)—that Article 33.1 applies only to refugees within the territory of the contracting State.

Article 33.1 provides that a contracting State shall not "expel or return ('refouler') a refugee" to the frontiers or territories where his life or freedom would be threatened for political reasons. Pet. Exh. 3. Although petitioners avoid any discussion of the geographic scope of Article 33.1 in their certiorari petition, they invoke (Pet. 17, 25) Article 33.1 to challenge their "return" to Haiti. Petitioners fail to appreciate, however, that the term "return" in Article 33.1 is expressly defined by the parenthetical insertion of the French word "refouler." As relevant to this case, *Cassell's French Dictionary* 627 (1978), defines "refouler" to mean "expel (aliens)"—a definition that obviously encompasses only aliens physically present in the territory of the contracting State. This construction is confirmed by paragraph 2 of Article 33, which provides that the benefit of non-refoulement may not be claimed by a refugee who is a danger to the security of "the country in which he is." Pet. Exh. 3.

The negotiating history also bears out this interpretation. The delegates to the drafting Conference placed in the record the Conference's understanding that the word "expel" in Article 33.1 refers to a "refugee already admitted into a country," while the term "return ('refouler')" refers to a "refugee already within the territory but not yet resident." The delegates also placed in the record their understanding that the "possibility of mass migrations across frontiers or of attempted mass migrations"—the precise context in which this case arises—"was not covered by article 33." This history was quoted and relied upon by Judge Edwards in his concurring opinion in *HRC* v. *Gracey*, 809 F.2d 794, 840 n.133 (D.C. Cir. 1987), in which he concluded that Article 33.1 does not apply to the Haitian interdiction program.[6]

---

[6] These and other portions of the negotiating history that confirm the State Department's interpretation—as well as the Department's official position in diplomatic undertakings and other forums since that time—are discussed in the government's open-

Finally, the Protocol incorporating Article 33 was ratified by the United States on the understanding that it conformed to the corresponding provisions of the INA[7]; by that time, this Court had already held, in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958), that under 8 U.S.C. 1253(h) (1958), even aliens who were physically present in the United States, but not lawfully admitted, were ineligible for withholding of deportation. See *INS* v. *Stevic*, 467 U.S. 407, 415, 417-418 (1984). A fortiori, the interdictee petitioners in this case, who

---

ing brief (at 16-20 & Addendum B) and reply brief (at 4-7) on the first appeal below, No. 91-6060.

Although petitioners do not address the extraterritoriality issue in the petition, they do include some discussion of the point in Appendix B to their Application for a Stay (at B17-B20). However, they fail to acknowledge the text of Article 33 that cuts against their position. Petitioners do contend (at B17-B-18) that any reliance on the negotiating history is misplaced, ignoring that this Court has made clear that such reliance is appropriate where the meaning of the treaty text is not "obvious." *See United States* v. *Stuart*, 489 U.S. 353, 365-366 (1989); *id.* at 374 (Scalia, J., concurring); *Air France* v. *Saks*, 470 U.S. 392, 400 (1985). Ironically, petitioners then proceed to rely (Stay Applic. App. B18-B19) on statements made by Louis Henkin at a meeting in 1950. However, as explained in the government's reply brief (at 6 n.8) on the first appeal below, Professor Henkin's remarks were made more than a year before the two sessions at which Article 33 was finalized, and they reacted to a different proposal. Moreover, Professor Henkin was not the United States representative at the Conference of Plenipotentiaries (where the definitive negotiating history discussed above occurred and the word "refouler" was inserted); his views were not expressed at the final sessions, and they were not adopted by the Conference.

[7] See S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson) ("Accession to the Protocol would not impinge adversely upon established practices under existing laws in the United States."); *id.* at VII, VIII (report of Secretary of State Rusk) (same); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"); 114 Cong. Rec. 29,391 (1968) (Sen. Mansfield).

are altogether outside the United States (in Cuba or on the high seas), have no rights under Article 33.1.[8] Petitioners cite no judicial ruling to the contrary. Their reliance on Article 33.1 therefore may be dismissed on this ground alone.

b. The court of appeals found it unnecessary to decide whether Article 33.1 could be judicially extended to the high seas or foreign soil, because it held that, in any event, "Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case." Pet. App. 43, at 3. That ruling (which the en banc court, without dissent, declined to disturb), is correct and is in agreement with the decisions of the other courts that have addressed the issue. See *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982) ("the Protocol's provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation"); *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir.) ("no new rights or entitlements were vested * * * by operation of the Protocol"), vacated on other grounds, 434 U.S. 962 (1977); *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989) ("Neither the Handbook nor the Protocol have the force

---

[8] Commentators likewise have concluded that Article 33.1 does not apply outside of a contracting party's territory. 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972); N. Robinson, *Convention Relating to the Status of Refugees: A Commentary*, at 162-163 (1953); Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 Va. J. Int'l L. 857, 861-862 (1986); Weis, *The United Nations Declaration on Territorial Asylum*, 7 Can. Y. Int'l L. 92, 123-124 (1969). Petitioners cite (Pet. 3, 28) the direction to the Attorney General in Section 3 of the Executive Order to ensure "strict observance" of existing "international obligations." However, Section 3 does not purport to identify specific sources of law (compare §§ 2(b)(1) and (2) (referring to the Convention on the High Seas)) or to expand any existing international obligations of the United States. The Executive Order therefore does not assist petitioners in seeking a judicial extension of Article 33.1 beyond the territory of the United States.

of law * * *. The Protocol was not intended to be self-executing."), cert. denied, 111 S. Ct. 751 (1991); *HRC* v. *Gracey*, 600 F. Supp. 1396, 1401, 1406 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).[9]

Treaties of the United States do not ordinarily create rights that are privately enforceable in U.S. courts. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); *Handel* v. *Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). An individual ordinarily can enforce a treaty in court only if it provides a private right of action. See, *e.g.*, *Head Money Cases*, 112 U.S. 580, 598-599 (1884).

Here, the text of the Protocol itself indicates that the parties did not understand it to create private rights of action, but instead contemplated implementation through the domestic law of each contracting State. Article III requires signatories to communicate the means by which they intend to implement the Protocol, thereby indicating

[9] In Appendix B to their Stay Application (at B13), but not in the certiorari petition, petitioners assert a conflict with the Fifth Circuit's decision in *Nicosia* v. *Wall*, 442 F.2d 1005 (1971). However, *Nicosia* did not discuss the self-execution issue; it simply assumed that Article 33.1 could be raised as a defense in an extradition proceeding. 442 F.2d at 1006. Moreover, the Fifth Circuit subsequently held in *Pierre*, cited in the text, that Article 33.1 is *not* self-executing. There accordingly is no circuit conflict on the issue.

Petitioners also cite (Stay Applic. App. B15) the description of the Protocol as "self-executing" in *In re Dunar*, 14 I. & N. Dec. 310, 313 (BIA 1973). However, this Court has found *Dunar* to be "not particularly probative of what the Protocol means." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.23 (1987). And contrary to petitioners' assertion, as the decision of an inferior administrative body, *Dunar* binds neither the Attorney General nor the remainder of the Executive Branch. Moreover, *Dunar* concluded—in agreement with the uniform judicial view—that the Protocol did not affect the coverage or execution of existing U.S. law. 14 I. & N. Dec. at 313-323.

that it left the matter of domestic implementation to the parties. See *Gracey*, 600 F. Supp. at 1406.[10] "Such provisions are uniformly declared executory." *United States* v. *Postal*, 589 F.2d 862, 876-877 (5th Cir.), cert. denied, 444 U.S. 832 (1979); see *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298-1299 (3d Cir. 1979). Moreover, as we have explained (see page 12, *supra*), the clear understanding of the President and Congress was that the Protocol would not itself be an independent source of rights, but rather would be subsumed within and reconciled with existing domestic law. Similarly, Congress's subsequent attempt, in the Refugee Act of 1980, to clarify domestic law to indicate its agreement with the Protocol, see *INS* v. *Stevic*, 467 U.S. at 425-428, is inconsistent with the notion that the Protocol was enforceable of its own force.[11]

[10] See also Executive Comm. of the UNHCR Programme, Conclusion No. 57 (XL), *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1989) (emphasizing "the need for the full and effective implementation of these instruments by Contracting States").

[11] While petitioners cite (Stay Applic. App. B12, B14, B16) several statements in decisions of this Court or materials preceding ratification that the Protocol is "mandatory" and "obligates" or "binds" the United States to comply with provisions of the Convention, that is not the question here. All treaties are binding and create obligations. The question is to *whom* do the obligations run? By acceding to the Protocol, the United States became obligated to other contracting States to comply with its provisions, but domestic implementation was necessary for the Protocol to be effectuated in the United States. As it happened, Section 243(h) of the INA already provided the necessary statutory mechanism for withholding of deportation. Petitioners rely (Stay Applic. App. B16) on the statement in Justice Scalia's dissenting opinion in *INS* v. *Doherty*, No. 90-925 (Jan. 15, 1992), slip op. 3, that the "nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *nonrefoulment* obligations under Article 33.1." This statement, however, indicates that the judicially enforceable rights at issue stemmed from the implementing legislation, not

But even if the Protocol were self-executing in the sense that a court (or administrative body) might refer to it for a rule of decision in disposing of a deportation or exclusion case that was otherwise within its statutorily-conferred jurisdiction, it still would not follow that the Protocol authorizes a court to fashion a novel cause of action for affirmative injunctive relief where Congress has not authorized such a suit. That is especially so as regards persons and events *outside* the United States, where the laws of the United States are presumptively inapplicable, *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991)—and where, as here, injunctive relief would interfere with military operations on the high seas and a base on foreign soil. Cf. *Argentine Republic*, *supra*.

c. Finally, if we assume (contrary to our submission) that Article 33.1 applies outside the territory of the United States and is self-executing, petitioners still would not be entitled to judicial relief. Because Section 2(c) of the Executive Order directs the Coast Guard not to return a refugee to his country of origin without his consent, there is no inconsistency between the interdiction program and the substantive nonrefoulement principle in Article 33.1. To the extent petitioners seek to change the internal procedures for implementing the Executive Order, Article 33.1 likewise furnishes them no assistance, because it does not prescribe particular procedures for the determination of refugee status, and thus mandates no particular role for administrative and judicial officials in the supervision of refugee determinations. Indeed, the U.N. High Commissioner has observed that state parties to the 1951 Convention and the 1967 Protocol "vary considerably" in their practices, including the determination of refugee status by informal, or *ad hoc*, means. See Office of the U.N. High Commissioner for Refugees, *Handbook On Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 191, at 45 (1988). Clearly, then, Article 33 provides no support for petitioners' attack on the interdiction and repatriation program.

---

directly from the "parallel" obligations of the United States under Article 33.1. Similarly, the discussion in *Stevic* (467 U.S. at 429 n.22) and *Cardoza-Fonseca* (480 U.S. at 440-441), upon which petitioners also rely (Stay Applic. App. B15-B16), in fact confirms that statutory implementation was necessary to give "domestic" effect to Article 33.1.

2. Even the district court was unpersuaded by the remaining documents and statutory provisions on which the Haitian petitioners rely in seeking to establish personal rights, cognizable in U.S. courts, under the President's interdiction program. Pet. App. 42, at 52-54. The court of appeals affirmed the rejection of those claims. Pet. App. 56, at 25-30. Those rulings are correct and do not conflict with the decision of any other court, and they therefore do not warrant review here.

a. Nothing in the Executive Order suggests a purpose to create private, judicially enforceable rights. In the first place, the Order's statement that "no person who is a refugee will be returned without his consent" (see Pet. 3, 17, 28) is a mere proviso to the President's description of what the internal instructions from the Secretary of Transportation to the Coast Guard regarding the interdiction program should include—specifically, a requirement that the Coast Guard return the interdicted vessel and its passengers to the country from which it came, where there is reason to believe that an offense is being committed. § 2(c)(3). "[B]ecause a proviso can only operate within the reach of the principal provision it modifies," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, No. 90-408 (Jan. 14, 1992), slip op. 10, the proviso here is part of the internal instructions to the Coast Guard, rather than a source of personal rights on the part of individuals external to the Coast Guard's operations.

Furthermore, as the court of appeals pointed out, the Executive Order specifically contemplates interdiction

and screening on the high seas, under inherently exigent circumstances and with prompt repatriation of aliens who are found not to qualify for refugee status. Pet. App. 56, at 28. That procedure allows no time or feasible mechanism for judicial review at the behest of affected aliens. Compare *Morris* v. *Gressette*, 432 U.S. 491, 503-505 (1977). In fact, although the Executive Order is unquestionably a valid exercise of the broad Presidential authority granted by the pertinent statutory provisions, 8 U.S.C. 1182(f), 1185(a)(1), nothing in those sections evinces any congressional intent to delegate authority to create private rights of the sort ordinarily necessary for an Executive Order to have the "force and effect of law." See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 304-306 (1979).

b. The foregoing principles apply with even greater force to INS's internal "Interdiction Guidelines and Operation Instructions" (see Pet. Exh. 7-9), on which petitioners also rely (Pet. 3, 25, 28). Like the Executive Order under which they were issued, the guidelines lack the "force and effect of law," because they lack a nexus to "some delegation of the requisite legislative authority by Congress." *Chrysler Corp.*, 441 U.S. at 304. As a result, the guidelines are merely internal agency directives of the sort that do not confer any enforceable rights or benefits. *Pasquini* v. *Morris*, 700 F.2d 658, 662 (11th Cir. 1983); *Dong Sik Kwon* v. *INS*, 646 F.2d 909, 918-919 (5th Cir. 1981).

c. Finally, petitioners have no rights under Sections 208 and 243(h) of the INA. As the district court pointed out, "the statutory rights and protections asserted are reserved, by the very terms of the statutes, to aliens within the United States." Pet. App. 42, at 53 (citing 8 U.S.C. 1158 (establishing asylum procedures only for aliens "physically present in the United States or at a land border or port of entry"), and 8 U.S.C. 1251 and 1253(a) (prescribing deportation procedures for aliens "in the United States")). The court of appeals agreed. Pet. App. 56, at 25-27; see also *Gracey*, 600 F. Supp. at

1404. Relief for refugees outside the United States is instead governed by Section 207 of the INA, 8 U.S.C. 1157, which commits such matters to the discretion of the President, in consultation with Congress, and to the discretion of the Attorney General, in implementing the President's decisions—without any provision for judicial review.

Petitioners point out (Stay Applic. App. B29-B30) that prior to its amendment by the Refugee Act of 1980, Section 1253(h) provided that "[t]he Attorney General is authorized to withhold deportation of any alien within the United States," but that the phrase "within the United States" was deleted and a prohibition against "return" of an alien was added in 1980. In petitioners' view, these changes suggest a congressional intent to extend the benefits of Section 1253(h) to any alien, anywhere in the world, who asserts to United States officials a fear of persecution. That remarkable result would conflict with the limitation of the deportation provisions of the Act (of which Section 1253(h) is a part) to aliens within the United States; contravene the rule against extraterritorial application of an Act of Congress in the absence of a clear statement to that effect; and lack any support in the legislative history. Further, paragraph (2)(C) of 8 U.S.C. 1253(h), also added in 1980, requires reference to the alien's conduct "prior to the arrival of the alien in the United States" in determining his eligibility for relief.

This Court has concluded that the 1980 amendments to Section 1253(h) were designed for the far more modest purpose of conforming its language to Article 33 of the Convention. *Stevic*, 467 U.S. at 421.[12] Article

[12] The term "return" in Article 33 of the Convention applies only to an alien who is already within the territory of the country (see page 11, *supra*), and there is no reason to believe that the addition of that term to 8 U.S.C. 1253(h) in 1980 had any different import. By the same token, the deletion of the phrase "within the United States" could, at most, have extended 8 U.S.C. 1253(h) to exclusion proceedings, since it was that phrase the

I(F) of the Convention confirms that Article 33 does not apply extraterritorially, because, like 8 U.S.C. 1253 (h)(2)(C), it conditions eligibility on the alien's conduct "prior to his admission" to the contracting State. Moreover, the legislative history of the Refugee Act of 1980 shows that the Convention (and thus 8 U.S.C. 1253 (h)) were understood to apply to "refugees within the territory of the contracting states." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979). This background refutes the interdictee petitioners' assertion that Congress has extended the relevant provisions of U.S. law to the high seas and foreign soil.

3. Finally, the Haitian petitioners invoke the APA to challenge the operation of the interdiction and repatriation program. Pet. 25, 26, 27; Stay Applic. App. B20-B29. As we have explained, however, none of the underlying sources on which the interdictees rely—Article 33.1 of the Convention, the Executive Order, the INS Guidelines, or the INA—affords them any substantive or procedural rights, much less rights that are cognizable in U.S. courts. The interdictees cannot overcome that fundamental defect simply by citing the APA.

Moreover, although the APA permits review of a broad range of administrative actions, it is unavailable where "statutes preclude judicial review" or "action is committed to agency discretion by law." 5 U.S.C. 701 (a). And the "presumption" of reviewability on which petitioners rely (Stay Applic. App. B23-B24) "runs aground when it encounters concerns of national security," and is inapplicable to matters affecting foreign affairs. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); *Chaney* v. *Heckler*, 718 F.2d 1174, 1195 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd, 470 U.S. 821 (1985). Against this background, the court of appeals correctly held that judicial review is foreclosed by both exceptions in 5 U.S.C. 701(a). Once again, that holding does not conflict with any decision of this Court or another court of appeals, and it presents no issue warranting review.

Court found significant in *Barber* in holding that Section 1253(h) did not apply in such proceedings. That question will not arise in the future, because the Attorney General, by regulation, has extended to aliens subject to exclusion proceedings the right to seek the relief afforded by 8 U.S.C. 1253(h). See 8 C.F.R. 236.6. In no event, however, would these textual changes give world-wide scope to Section 1253(h).

a. As the court of appeals properly recognized, the INA precludes judicial review of claims to asylum by aliens outside the United States. Pet. App. 56, at 15-19. The INA expressly creates rights of review regarding asylum and withholding of deportation claims, but only for aliens "physically present in the United States or at a land border or port of entry" (8 U.S.C. 1158(a)) or aliens "in the United States," and thus subject to the deportation provisions. See 8 U.S.C. 1105a, 1226, 1227, 1253(a). These limitations, "fairly discernible in the statutory scheme," leave no question that Congress intended to bar review at the behest of aliens beyond our borders. *Block* v. *Community Nutrition Institute*, 467 U.S. at 351 [13]; cf. *Ardestani* v. *INS*, 112 S. Ct. 515, 518-519 (1991) (APA inapplicable to administrative procedures under INA).

As the court of appeals also noted, permitting judicial review here, notwithstanding the scheme of the INA, would conflict with a long history of decisions recognizing that Congress has never permitted judicial review of immigration decisions affecting aliens who are outside the United States and have "never presented [themselves] at the borders." *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956); see Pet. App. 56, at 17-19. This principle is reflected, for example, in the settled rule that visa decisions by U.S. consular officials are wholly unreviewable, under the APA or otherwise. See *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Pena* v. *Kissinger*, 409 F. Supp. 1182,

[13] See also *United States* v. *Fausto*, 484 U.S. 439 (1988) (provision for judicial review under Civil Service Reform Act of 1978 for certain categories of employees by implication precludes judicial review for other classes of employees).

1185-1186 (S.D.N.Y. 1976). It also is reflected in Section 207 of the Act, which commits matters concerning the admission of refugees from outside the United States to the discretion of the President and the Attorney General, without any provision for judicial review. There is no reason why Haitians on the high seas or in Cuba should have any greater right to judicial review of actions or procedures regarding their claims to refugee status and discretionary relief than those who enter the U.S. embassy in Haiti to seek relief from U.S. consular officials.[14]

b. The court of appeals also correctly held that the subject of petitioners' challenge—the processing of refugee claims of aliens outside the country—is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Where the applicable statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," APA review is precluded. *Heckler* v. *Chaney*, 470 U.S. at 830. In this case the INA furnishes no standards by which a court could assess the propriety of Coast Guard and INS actions in the interdiction program. On the contrary, Congress has granted the President broad discretion to act with regard to the exclusion of aliens "as he shall deem necessary." 8 U.S.C. 1182(f); see also 8 U.S.C. 1185(a)(1). Such provisions provide no discernible standards for judicial review. *Webster* v. *Doe*, 486 U.S. 592, 600-601 (1988).

---

[14] Petitioners (Stay Applic. App. B22 n.14) and Judge Hatchett (Pet. App. 56, at 12-13) miss the point by focusing on whether aliens abroad are "persons" for purposes of the APA. The court of appeals did not rest its holding on a contrary proposition, and this case presents no occasion to consider whether aliens outside the United States may ever invoke federal court jurisdiction to bring an APA action. But see *Johnson* v. *Eisentrager*, 339 U.S. 763, 777-778 (1950). Even if we assume, *arguendo*, that such an action might lie, it is the carefully drawn scheme of the INA—which expressly affords judicial review of many immigration matters, while committing others to the sound discretion of the Executive—that bars the present action by aliens outside the United States.

Nor is there "law to apply," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), in the several documents upon which plaintiffs rely, because none purports to lay down any firm rules regarding the *procedures* by which refugee determinations must be made. The Executive Order consists merely of general instructions from the President to Members of his Cabinet regarding the implementation of a law enforcement program. The court of appeals correctly pointed out that the proviso in Section 2(c)(3) "that no person who is a refugee will be returned without his consent" says nothing about how the INS is to determine who is a refugee. Pet. App. 56, at 22. Similarly, the broad instruction to the Attorney General in Section 3 of the Order—to "take whatever steps are necessary" for the fair enforcement of the immigration laws—says nothing about what "steps" he may deem "necessary" to that end. Nor do the INS guidelines provide any standards appropriate for judicial enforcement. Although they offer—consistent with their title—internal operating *guidelines* as to some aspects of conducting interviews, they are prefaced by the recognition that the decision whether shipboard interviews are logistically possible at all must depend upon the discretionary military judgments of the commanding officer of the Coast Guard vessel in question that such activities are "safe and practicable" under the circumstances. Pet. Exh. 9. As demonstrated by the experience in this case, the commitment of pre-screening interviews to the discretion of INS is also strongly reinforced by the disruption of operations that would be caused by judicial review, and by the difficult nature of the judicial inquiry into the details of interviews that occur abroad. Cf. *Colon* v. *Carter*, 633 F.2d 964, 966-967 (1st Cir. 1980) (refusing review of the transfer of refugees to Fort Allen, Puerto Rico); *Perales* v. *Casillas*, 903 F.2d 1043, 1047-1048 (5th Cir. 1990) (declining review of INS voluntary departure determinations).[15]

---

[15] Similarly, as we have explained (see pages 16-17, *supra*), Article 33.1 of the Convention—even if it applied—would prescribe no particular procedures for making refugee determniations.

It is no answer to suggest, as petitioners did below, that while the President's actions in this setting are unreviewable, those of his subordinates in carrying out his directives are not. See Pet. App. 56, at 27. That argument would destroy the President's discretion in all matters other than those that he can execute personally. Yet when the President's subordinates act in the sensitive areas of foreign affairs, border protection, and military operations at issue here, "their acts are his acts" and are equally beyond the power of a court to control. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). If a court presumed to interpret the President's orders to his subordinates, assess whether they have effectively carried out the orders, and prescribe the consequences if it believes they have not done so, it would effectively seize all the President's discretion to itself. It would thereby ignore the important fact that the President's control of his subordinates combines a complex system of written directives, oral instructions, and continual monitoring that may result in a constantly evolving pattern of action. To impose on this system a judicial process that moves with untoward slowness may prevent development of policies that can deal effectively with changing world events. Under our system of government, a court's injunctive authority is no substitute for the authority of the President to hire, direct and fire those whom he chooses to implement such policies.

c. Finally, even if judicial review under the APA is not entirely foreclosed by the exceptions in 5 U.S.C. 701(a), the APA does not excuse the courts from their duty "to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). That provision was enacted as part of the 1976 amendments implementing the recommendations of the Administrative Conference of the United States (H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976)), which were designed *inter alia*, to ensure that the waiver of sovereign immunity in the APA did not allow courts to "decide issues about

foreign affairs, military policy, and other subjects inappropriate for judicial action." See *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference Committee on Judicial Review). As we have explained in our January 30, 1992, application to this Court for a stay pending appeal (at 16-18, 37-39) and in our memorandum of this date opposing petitioners' application for a stay pending certiorari, the injunctive relief repeatedly granted by the district court in this case impermissibly intruded into those very areas. If the district court instead had "pa[id] particular regard for the public consequences in employing the extraordinary remedy of injunction," *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982), it would have dismissed petitioners' action (as the court of appeals has, at last, ordered), for "[t]he separation of powers problems present here make this virtually a textbook case for refusing * * * discretionary relief." *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985). The Court should allow that dismissal of this unprecedented suit to stand.

B. The bulk of the argument in the certiorari petition is devoted not to the contentions on behalf of the interdicted aliens, discussed above, but to the baseless contention by petitioner HRC that it has a First Amendment right to have its representatives enter a U.S. military base in a foreign country or board a U.S. military vessel on the high seas to meet with interdictees who are held in custody. See Pet. 14-17, 20-25. We have fully answered that contention in our January 30, 1992, application (at 22-37) for a stay of the injunction based on this First Amendment claim (which the Court granted), and there accordingly is no reason to repeat that entire discussion here. The court of appeals has now rejected HRC's First Amendment claim, largely for the reasons set forth in our stay application. Pet. App. 56, at 30-38.

The First Amendment ruling below is in full agreement with the only other appellate decision to have considered a similar claim—the D.C. Circuit's decision in *Ukranian-American*, which found no right of access even with respect to an alien in custody in the United States—and is fully consistent with this Court's decisions. *A fortiori*, there could be no conceivable basis for reinstating the district court's December 20, 1991, injunction barring repatriation of interdictees until HRC has exercised its supposed right of access. Only the individual interdictees (not HRC) have standing to prevent their repatriation. *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1725-1726 (1990). Significantly, HRC does not attempt to defend the proposition that it is entitled to an injunction barring repatriations on First Amendment grounds. There accordingly is no basis for the Court to grant certiorari on the First Amendment issue.

Indeed, Judge Hatchett, who was otherwise sympathetic to petitioners' claims, agreed with the majority below that HRC has no First Amendment right of access to Coast Guard cutters. Pet. App. 56, at 4 (dissenting opinion); compare *Gracey*, 809 F.2d at 800 (characterizing such a claim as "frivolous"). Because the program of interdiction, interview, and repatriation is designed to (and did for ten years) take place entirely on Coast Guard cutters—and because interdictees are now in custody at Guantanamo only as a result of the wholly unwarranted injunctions previously entered in this case—it is especially clear that HRC's First Amendment claim does not warrant review.

It bears reiteration that the individual interdictees, who are outside the United States, have no rights under the First Amendment to associate with or speak to representatives of HRC or to petition the United States Government for redress of grievances. Pet. App. 42, at 44-45 n.19; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265, 271 (1990); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904). Undeterred by this lack of reciprocal rights on the part of the persons

with whom it claims a constitutionally protected right to associate, HRC insists that the First Amendment affords it a right of access to Coast Guard cutters and Guantanamo to speak with and offer legal advice to individual interdictees. However, the interdictees likewise have no right to the assistance of counsel in connection with the screening process. The absence on the part of the interdictees to *receive* the assistance of counsel is fatal to any assertion by HRC of a constitutional right to *furnish* such assistance. Counsel cannot rely on their own asserted First Amendment rights to intrude themselves into a process in which counsel otherwise have no role, and courts cannot rely on the interests of parties external to an administrative process to impose additional requirements that neither Congress nor the agency has chosen to adopt. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519 (1978).

This conclusion is especially sound here, because the asylum pre-screening process is designed to determine, in an informal, nonadversarial setting, whether an interdictee exhibits a credible fear of persecution. The screening process is necessarily brief, designed to take place on Coast Guard cutters. As the court of appeals pointed out (Pet. App. 56, at 36-37), providing access to cutters would impose a "substantial burden" on the government. In addition, the presence of counsel would be incompatible with the informal and nonadversarial nature of the screening interview. Contrary to petitioners' contention (Pet. 12-13, 14, 15-17, 20-22) there is nothing improper—or impermissibly "content-" or "viewpoint-based"—about INS's decision to protect the informality and nonadversarial nature of its screening process in this manner, especially in the custodial setting of a military vessel or base, to which the public at large is not invited. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-326 (1985); see also *Wolff* v. *McDonnel*, 418 U.S. 539, 570 (1974) (no right to

counsel at prison disciplinary proceeding); *United States* v. *Gouveia*, 467 U.S. 180, 185 n.1 (1984).[16]

If the government must allow representatives of HRC to board a Coast Guard cutter or enter Guantanamo so they can speak with and advise interdictees held in custody there, any organization or person interested in assisting or advising interdictees would have a similar First Amendment claim. See *Ukranian-American*, 893 F.2d at 1381-1382. The fact that HRC's organizational purpose is concerned with Haitian migrants does not give it an interest distinct from any other member of the public in this regard. Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982).

Nor is HRC's position advanced by its reliance (Pet. 20, 22-24) on its status as counsel in this class action.

[16] Petitioners cite solely to the November 20, 1991 Declaration of Robert K. Wolthuis (Pet. 19 n.17) to support their extraordinary assertion that respondents have relied upon "fraudulent declarations" (Pet. 18) in this case. That declaration, along with five others, was submitted in the district court in support of the government's motion to vacate or stay the temporary restraining order issued the previous day—just hours after petitioners filed their complaint. It appears to have been cited twice on appeal, in our November 21, 1991 stay motion (in No. 91-6027, at 7) and in our December 4, 1991 stay motion (in No. 91-6060), both times for the noncontroversial proposition that the United States had initiated a multinational diplomatic effort to deal with the Haitian crisis—a proposition independently supported by the concurrent citation in both motions to the Declaration of Assistant Secretary of State Bernard W. Aronson, also filed in the district court on November 20. Moreover, as plainly revealed in the very deposition testimony cited by petitioners, there was nothing sinister about Mr. Wolthuis' acting in the capacity of Assistant Secretary of Defense for International Security Affairs on November 20, 1991, the day he was called upon to execute a declaration as the temporary head of the office. The Assistant Secretary position had been vacant since late August; Mr. Wolthuis was the Deputy Assistant Secretary of Defense for Global Affairs; and when the principal deputy, who usually served as Acting Assistant Secretary was out of the country (as he was on that day), the position is temporarily filled by one of the remaining deputies on a rotating basis. See Pet. App. 78, at 5-6.

Otherwise, an organization could circumvent wholly legitimate custodial arrangements and administrative procedures—and claim a right to alter them on a program-wide basis—through the simple expedient of filing a lawsuit. Moreover, HRC acts as counsel only with respect to the class claims in this litigation; that is something quite different from serving as counsel to each interdictee with respect to his own potential claim for asylum.

Finally, there is no merit to petitioners' legal contention (Pet. 15-17, 20-22), made for the first time in this Court, that respondents have arbitrarily denied access to HRC, while broadly permitting access to Guantanamo and even Coast Guard cutters to others.[17] As detailed in the Affidavit of John W. Cummings, Acting Assistant Commissioner of INS for Refugees, Asylum and Parole, the present policy is to permit access only to the following non-government personnel: (1) persons approved to participate in the screening process in some official capacity, such as the UNHCR; (2) members of the press, whose access does not include attendance at actual interviews; and (3) certain others, such as religious workers, who may furnish essential services to the aliens. Cummings Aff. ¶¶ 10-11 (Pet. App. 71).

Petitioners can establish no flaw in these criteria as means of regulating access. The presence of representatives of UNHCR or comparable organizations to observe and assist in the official business of the camps in no way imparts an obligation to allow private groups, such as HRC, to do the same or to enter the camps for other purposes. Similarly, providing limited access to members of

[17] As the court of appeals observed (Pet. App. 56, at 32 n.7), the district court noted that there was no allegation that the denial of access to HRC was the product of viewpoint discrimination, and petitioners' brief on appeal likewise did not claim discrimination. Moreover, although the district court observed in its December 20 order that the government had granted access to Guantanamo by the U.N. High Commissioner for Refugees (UNHCR) and the press (Pet. App. 46, at 9), that did not constitute a finding of viewpoint discrimination. Rather, it appears to have been an effort to justify the court's First Amendment-based injunction against repatriations, on the ground that it would not be intrusive.

the press—whose purpose of informing the American public about the events transpiring in the interdiction program is altogether different (and less intrusive) than the role of counsel that HRC seeks to play—is an eminently reasonable accommodation, fully consonant with First Amendment values. And in support of its assertion that the government has opened the camps to other groups, HRC cites two affidavits describing visits by a priest and by an organization called Lutheran Ministries. See Pet. 22 n.19 (citing Punancy Aff. (Pet. App. 31) and Wenski Aff. (Pet. App. 68)). The fact that such an organization was given access in no way undermines the legitimacy of the policy outlined above—even if, in one instance, it turned out that the visit went beyond religious ministry and included the sort of activities in which HRC seeks to engage. Punancy Aff. ¶¶ 1-2, 5.

In any event, as we have pointed out above (see page 4, *supra*), HRC *was* granted access to camps and cutters at Guantanamo through the visit of its team of lawyers and support staff in November 1991. HRC does not show —or even claim—that this access was inferior to that granted any comparable group. Petitioners' belated reformulation of their sweeping First Amendment claim into one of discrimination therefore manifestly does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MICHAEL JAY SINGER
JOHN F. DALY
EDWARD T. SWAINE
Attorneys

FEBRUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45328